



POLICE DEPARTMENT

May 12, 2008

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Police Officer Miguel Marte
Tax Registry No. 927135
73 Precinct
Disciplinary Case No. 83272/07

Police Officer Francisco Castillo
Tax Registry No. 926682
Forensic Investigation Division
Disciplinary Case No. 83274/07

The above-named members of the Department appeared before me on February 6, 2008, charged with the following:

Disciplinary Case No. 83272/07

1. Police Officer Miguel Marte, while assigned to Patrol Borough Brooklyn North Anti-Crime, while on duty, at approximately 2315 hours on March 15, 2006, in the vicinity [REDACTED] in Kings County, abused his authority as a member of the New York City Police Department, in that he entered and searched the apartment of an individual known to this Department without the requisite legal authority to do so.

P.G. 203-10, Page 1, Paragraph 5 - ABUSE OF AUTHORITY

Disciplinary Case No. 83274/07

1. Police Officer Francisco Castillo, while assigned to Patrol Borough Brooklyn North Anti-Crime, while on duty, at approximately 2315 hours on March 15, 2006, in the vicinity of [REDACTED] in Kings County, abused his authority as a member of the New York City Police Department, in that he entered and searched the apartment of an individual known to this Department without the requisite legal authority to do so.

P.G. 203-10, Page 1, Paragraph 5 - ABUSE OF AUTHORITY

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The Department was represented by Katie O'Connor, Esq., Department Advocate's Office, and the Respondents were represented by Michael Martinez, Esq.

The Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondents are found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on March 15, 2006, the Respondents were on duty, in plainclothes, in an unmarked Department vehicle, assigned to a Patrol Borough Brooklyn North Anti-Crime team supervised by Sergeant Terrance Palusko; that at about 2315 hours, they spotted a man on the street who appeared to have a handgun in his waistband; that this man ran inside an apartment building at [REDACTED] that they pursued the man into the building; and that they entered the [REDACTED] floor hallway of the building and went to the door of apartment [REDACTED]

The Department's Case

The Department called Tomas Sosa and Iris Sosa as witnesses and offered the out-of-court statements of Heesena Said and Iris Rodriguez.

Tomas Sosa

Tomas Sosa (Tomas), who has been employed by Lady Footlocker since 2002 and who presently serves as the assistant manager of a Lady Footlocker store, testified that on March 15, 2006, he was living with his mother in her apartment at [REDACTED]
[REDACTED]
[REDACTED]

Tomas recalled that on the evening of March 15, 2006, he left Apartment [REDACTED] to carry bags of garbage outside the building. When he came back inside the building, he observed three police officers. One of the officers was standing on the stairs leading to the second floor and "blocked my way" to the second floor. He observed another officer standing in front of Apartment [REDACTED]. One officer asked him, "Where do you live?" Tomas testified that he pointed to the door of Apartment [REDACTED] and told the officer, "Over there." The officer then asked him if he had any ID. Tomas told the officer that he had just taken the garbage out and had not brought his ID with him. Tomas recalled that one of the officers told him, "We're looking for somebody regarding illegal activities." Tomas testified that because he did not have his door key with him, he knocked on the door of Apartment [REDACTED]. After about three minutes, his sister-in-law opened the door and let him inside. He testified that as he entered the apartment, one of the officers put his foot in the door jam. Tomas testified that he tried to close the door, but the officer's foot prevented him from closing it. This officer then pushed the door open and entered the apartment. Tomas testified that the two officers who were with him followed him inside. Tomas

further testified that at this point his sister Iris came out and asked the officers, "Do you have a warrant?" One of the officers told Iris, "We have nothing to show."

Tomas testified that he picked up the telephone and dialed 911. He told the operator who answered his call that there were "some officers in my home without showing a warrant." He handed the phone to his sister-in-law. He testified that he "was trying to get police officers out of my home." He testified that he asked them, "Why are you in my home?" He testified that he also asked them whether they had a warrant. One of the officers told him, "We're from the 81 Precinct." Tomas testified that he observed one of the officers in the apartment's bathroom and that they "opened doors" inside the apartment. Tomas testified that when the officers entered the apartment, his mother was sleeping. However, she woke up and came out of her bedroom and into the living room. He testified that his mother was "angry" and "shook."

On cross-examination, Tomas identified a photograph and testified that it accurately depicted the front of [REDACTED] [Respondent's Exhibit (RX) A]. Tomas testified that when he went outside to throw out the garbage he did not bring any keys with him and that is why he followed the officers into the building when they entered because he did not have his key to the front door. He testified that he has been arrested three times. He recalled that he was arrested for possessing an open container on the street and that he was arrested on another occasion because he was jimmying a vending machine "trying to get a quarter back." He could not recall why he was arrested, or what offense he was arrested for, on the third occasion. He testified that he has been stopped by police on two or three occasions. He testified that after he threw out the garbage, he was standing in front of his building just to get some fresh air when he saw

the police officers “rush” past him into the building. He testified that as he was walking up the stairs to return to his apartment, one of the officers was blocking the stairs but that he was able to get past the officer because he said “Excuse me.” He testified that after he walked past this officer up the stairs, the officer followed him to the door of his apartment. Tomas testified that he entered the lobby of the building and that to get through the locked front door he pressed the button for Apartment [REDACTED] and his sister hit the front door buzzer so that he could get back inside the building.

Iris Sosa

Iris Sosa (Iris), who is 21-years old and attends John Jay College of Criminal Justice, testified that on March 15, 2006, she resided in apartment [REDACTED] and that she was sleeping when she heard her brother Tomas’s voice along with male voices she did not recognize. She got out of bed and entered the living room of the apartment. She saw three men inside the living room. She testified that she asked them, “Who are you?” They responded, “Police officers.” Iris identified the Respondent Marte in the trial room as one of the officers she addressed. She asked the officers whether they had a warrant and what precinct they were from. When she asked the officers for their shield numbers, she did not receive an immediate response.

Iris recalled that her mother came into the living room and asked, in Spanish, “What’s going on?” She recalled that Tomas argued with the police officers. She recalled that she asked one of the officers, “Why are you here?” She testified that she told the officers, “Leave, because I am not sure you are really officers.” The officers did not immediately leave. She testified that she telephoned the Utica Avenue stationhouse

because she believed it was the closest precinct to their residence. Then she telephoned the 81 Precinct and then she telephoned the Civilian Complaint Review Board (CCRB).

On cross-examination, she testified that she was aware that her brother Angel had served a prison sentence at an upstate correctional facility but she never asked him why he had been sent to prison. She testified that when she entered the living room, "some of them were already in the living room" and she saw other police officers trying to enter the apartment by pushing their way inside but Tomas was pushing the door closed to try to prevent them from entering.

She was confronted with a statement she made during a telephone interview conducted by CCRB on March 23, 2006, that the police officers had entered by pushing her brother into the apartment. She testified that she did not see all three police officers do this, only two because one of the officers was inside the apartment already. She testified that the police officers did not knock on the door before they entered the apartment. She was confronted with a statement she made to CCRB that the police officers had knocked on the door, that her brother's girlfriend had opened the door for them and that the officers then pushed the door open and entered the apartment. She testified that this did not happen and that she had no recollection that she had said this during her telephone interview.

She was also confronted with a statement she made to CCRB that she and Iris Rodriguez had pushed the officers out into the hall. She testified that she had no recollection that she and Rodriguez had pushed the officers out into the hall or that she had said this during her telephone interview.

One of the officers, who she described as a "white, bald guy" searched the bathroom of the apartment. She testified that nothing was broken or taken by the police officers. She had no recollection that the officers had asked about a gun or had asked if everyone in the apartment was okay. She testified that she only heard a knock on the apartment door, not a bell ring or a buzzer. Although she received "a lot" of letters from CCRB requesting that she appear at CCRB, and even though a CCRB investigator telephoned her and pleaded with her, and also with her brother Tomas and Iris Rodriguez, to come to CCRB to view photo arrays, none of them ever did so.

Heesena Said

During a tape-recorded interview conducted at the Civilian Complaint Review Board (CCRB) on March 27, 2006 [Department's Exhibit (DX) 1], Said stated that she is Angel's girlfriend and they were sleeping together in the living room of apartment [REDACTED] when Tomas, Angel's brother, rang the doorbell. When Said opened the door to let Tomas inside, she saw three officers behind him. Tomas came inside the apartment.

Said offered the following narrative: "I didn't know what was going on, no one was telling me anything, just that the officers were telling me how many people were in the room, how many people were in the room and I was trying, they were trying to push as they, as in talking, they wouldn't let me know what was going on, they were trying to push through the door trying to come in. And I just kept saying, 'What's going on, what's going on?' They wanted to know who was inside of the apartment. I told them who's inside the apartment, we was all sleeping and Thomas was standing in front of the door. They were nudging to come inside of the apartment and they didn't show us no

badge number, they didn't show us, um they wasn't giving an explanation, they just basically telling us they basically wanted to know who was in the apartment. After I told them (who) was in there, the officer that was in the front right, him and Thomas were arguing because Thomas wouldn't let him in and he was pushing to come in and somehow he pushed Thomas. We were asking them we want your badge numbers because you know what they were doing was not right and they were just like passing it off. But all they said is they're from the 81 Precinct. This was while we were asking them throughout, we were asking at the beginning and the guy in the back, actually when everybody came out, then he said we're from the 81 Precinct. But while they were trying to come in, and I was just standing there and Thomas got on the phone, because he called 911 and while he was pushing Thomas he gave the phone and I was speaking to the lady on the 911 and she was telling me, well why are you guys calling if the police is already there? And we were trying to tell her the police was the ones that were harassing us. Well, he was trying to see who was inside the house. He wanted to come in."

Said was asked whether she or Tomas at any point gave permission to enter the apartment. She answered, "No. We was actually telling them let's talk outside. They didn't want to hear that. The door was, you know how when you're standing in front of a door and have it a little bit opened, that's how he was and he had his foot inside the door so he don't shut it. The white officer, he had his foot inside, inside the door so you don't shut it and I guess Tomas was trying to shut the door, I'm not really sure and he just pushed him. All of a sudden he turned the flashlight on, opened the door, walked into the apartment, walked in, he got as far as the living room, he passed the living room search the living room passed, like when you walk through the apartment, you go straight and all

the bedrooms are right there. So he got as far as up to the bathroom, which is the first door to the right, went into the bathroom. Then my boyfriend came out of the room because he was sleeping, and then everybody woke up at that point and he was like, 'What's going on, what's going on?' After Thomas's mother came out he started to back off. They still was in the apartment, all three of them, he started walking towards the door and Thomas's mother was like, she walked out and then they started talking in the front of the apartment trying to see what's going on and she was, he was trying to say that he was selling drugs in front of the apartment but there was, I don't know what happened but that's not what was going on, they were just assuming things. Then they told us right there they were from the 81 Precinct."

Iris Rodriguez

Rodriguez, during a tape-recorded interview at CCRB on March 27, 2006 (DX 2), stated that she is the mother of Tomas and Iris Sosa and offered the following narrative:

"I sleeping in my room when I hear something in the living room. When I wake up I say what happened? When I say there are some people in front of my room. I say what happened, what are you doing here? Why you stay here? I saw one here and the other in the living room and the other in the door...The officer go inside. They don't know why because my son no have problem...I don't ask them why the officer looking in my room. When I say about the other officer, 'I'm sorry, I'm looking for somebody,' I say 'Yeah, but you are not supposed to come in front of my house. You supposed to knock my door...but you not supposed to come to looking for my, the other room because is not legal. I say (to) my son, 'Okay, okay. I speak to the officers in the living room.' I don't

know (when the officers left). I don't know because when I wake up I say, 'What happened?' but I do not remember. No, I don't remember. But when I speak to him (it took) about two or three minutes, no more."

The parties stipulated that the tape recording of the 911 call regarding this incident was destroyed in the normal course of Department business.

The parties stipulated into evidence the Sprint Report (RX B) regarding this incident. [The Sprint Report indicates that a "MC" (male complainant) "at loc arguing with someone...apt [REDACTED]...flr..." and that a "FC" (female complainant) then stated that "someone (is) at the door," and that "MC left phone" number.]

The Respondents' Case

The Respondents called former Sergeant Terrence Palusko as a witness and testified in their own behalf.

Retired Sergeant Terrence Palusko

Sergeant Palusko, who retired from the Department on October 31, 2007, after he was approved to receive a line-of-duty disability pension, testified that he and the Respondents chased the armed man they had spotted on the street when he ran inside the front door of [REDACTED]. As he and Respondent Castillo entered through the front door of [REDACTED], Respondent Marte remained on the street and watched the interior stairwell. Respondent Marte called to them that the armed man had not entered the stairwell leading from second floor to the third floor of the building. They all

then ran up to the second floor landing. They saw two doors, one on each side of the landing. When they started knocking on the door on the left, the door of the apartment on the right opened slightly. Sergeant Palusko, with the Respondents standing behind him, stood at the threshold of the door and asked the male who had opened the door if anyone had just run inside the apartment and if everyone inside was okay. The male did not try to close the door. Another male inside the apartment who was wearing only underwear, called to the male who had opened the door, "Don't let them in, they need a search warrant!" Sergeant Palusko testified that in his "gut" he was "ninety-nine percent sure" that male inside the apartment who was wearing only underwear was the armed man they had spotted on the street, but, since he did not get a good look at the man's face, he was not "one hundred percent" certain that it was the same man. He consulted with the Respondents who both told him that they were not "one hundred percent sure either" that it was the same man. Sergeant Palusko testified that since they did not have "probable cause," he "stopped it right then and there." They did not enter the apartment. He testified that one of his feet might have been inside the apartment in that his foot may have been half on and half off "the saddle" of the door which established the entry threshold in that it separated the inside of the apartment from the outside. He testified that the door did not hit his foot. An older woman inside the apartment who spoke Spanish also came to the door. After a brief conversation which lasted only two minutes, the officers left.

Sergeant Palusko acknowledged that in September, 2007, he signed a Schedule B Command Discipline which stated that he had wrongfully entered and searched apartment [REDACTED] and that he supervised questioning of an individual. He forfeited ten

vacation days. He testified that he only agreed to accept a Command Discipline regarding this incident because he wanted to immediately retire from the Department since he had been approved for his line-of-duty disability pension.

On cross-examination, he testified that had it not been his desire to immediately retire from the Department, he would not have signed the Command Discipline (CD). Rather, he would have "fought it all the way" because "this is my first CD for something I didn't do."

Respondent Castillo

Respondent Castillo testified in a manner consistent with Sergeant Palusko with regard to the armed man they spotted on the street, their pursuit of this man [REDACTED] and the conversation that took place at the entry threshold of the door that opened on the second floor. The Respondents stood behind Sergeant Palusko as he stood at the threshold of the door and asked the male who had opened the door if anyone had just run inside the apartment, was everyone inside okay, was anyone being held against their will and is there anyone else inside the apartment. Respondent Castillo recalled that the male inside the apartment who called out, "Don't let them in! They don't have a warrant!" appeared "nervous and sweaty." Sergeant Palusko asked both the Respondents, "Is this the guy?" They both told him that they could not be certain he was the man they had seen outside the building. By yelling, this man "was getting everyone else in the apartment upset." An older woman came to the door and appeared upset. Respondent Marte spoke to her in Spanish. Respondent Castillo testified that none of the officers entered apartment [REDACTED]

On cross-examination, he testified that he prepared a UF 250 Stop, Question & Frisk Report and that he wrote in his activity log on March 15, 2006: "one male stopped CPCW" at "[REDACTED] UF 250 prepared." He testified that the male he was referring to in this entry was the one who opened the door. On redirect-examination, he testified that he did not recognize Tomas Sosa as the male who had opened the door.

Respondent Marte

Respondent Marte testified in a manner consistent with Respondent Castillo and Sergeant Palusko. He testified that they all chased the armed man they had spotted on the street when he ran inside the front door of [REDACTED]. As Sergeant Palusko and Respondent Castillo entered [REDACTED], he stayed outside and watched the interior stairwell through the glass windows on each stairwell floor which could be viewed from the street (RX A). He realized that the armed man must have stopped on the second floor because he never entered the stairwell leading to the third floor of the building. He entered the building, ran to the second floor and yelled out to Sergeant Palusko and Respondent Castillo, "He didn't go past the second floor." When the door on the right opened, he stood behind both Sergeant Palusko and Respondent Castillo as Sergeant Palusko spoke to a male. He then saw another male inside the apartment run up to the door yelling, "Don't allow them in! They need a search warrant to come in!" This man was "sweaty" and looked "scared." He caused "an alarm" inside the apartment. Respondent Marte testified that "in my heart" he believed that this was the man they had chased into the building but he could not be certain it was the same man and he told that to Sergeant Palusko. They did not enter apartment [REDACTED], although Sergeant Palusko's feet

may have been inside the apartment because he was straddling "the saddle" of the door but not holding it open. No one tried to close the door on Sergeant Palusko.

On cross-examination, he testified that through the open door he saw two males and one female, an older woman in her 50s. Sergeant Palusko, Respondent Castillo and him were at the door about three minutes. He made no entries in his activity log regarding this incident.

FINDINGS AND ANALYSIS

It is charged that the Respondents abused their authority by entering and searching apartment [REDACTED] without the requisite legal authority to do so.

Although Sergeant Palusko acknowledged that he signed a Command Discipline that he had wrongfully entered and searched apartment [REDACTED] on March 15, 2006, he testified that he had not actually entered and searched that apartment. Both of the Respondents denied that they had entered and searched apartment [REDACTED].

Thus, the question presented is whether the Department met its burden of presenting credible evidence which proved by a preponderance of the evidence that the Respondents entered and searched apartment [REDACTED].

Tomas and Iris Sosa testified that the officers who were with Palusko followed him into the apartment and searched it with him. Tomas' testimony must be examined in light of a major inconsistency between his trial testimony and the Sprint Report in evidence. Tomas' testimony that he told the 911 operator that there were "officers in my home"¹ and that he then handed the telephone to his sister-in-law, is not supported by the

¹ Since the tape recording of the 911 call regarding this incident was not preserved, the Sprint Report is the only existing record that reflects what Tomas told the 911 operator who answered his call.

Sprint Report (RX B). The Sprint Report indicates that a “FC” (female complainant) told the 911 operator that “someone (is) at the door.” This independent fact contradicts Tomas’ claim that when he handed the telephone to his sister-in-law “officers” were inside the apartment.

Iris Sosa’s testimony must be examined in light of the inconsistencies between her trial testimony and what she told CCRB about this incident. Although she testified that the police officers did not knock on the door before they entered the apartment, it is not disputed that she told CCRB that the police officers had knocked on the door and that her brother’s girlfriend had opened the door for them. She also testified that she had no present recollection at all that she and Rodriguez had pushed the officers out into the hall. Given the unusual nature of such an action, if she actually had done this, she should have been able to recall it. It is not disputed that she asserted to CCRB that she and Iris Rodriguez had done this. Iris also offered implausible testimony that although she was aware that her brother Angel, who was living with her, had been imprisoned at an upstate correctional facility, she never asked him why he had been sent to prison.

Finally, the testimony of both Tomas and Iris Sosa must also be examined in light of their failure to cooperate with CCRB’s investigation of this incident. Although the CCRB investigator sent numerous letters requesting that they come to CCRB to view photo arrays, and even though the CCRB investigator pleaded with Iris to come in, neither of them ever complied with the investigator’s request.

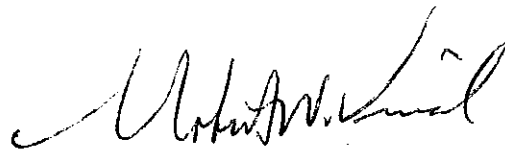
The CCRB statements of Iris Rodriguez and Heesena Said were offered by the Department as hearsay at this trial. Since Said is Angel’s girlfriend she is an interested witness in this matter, and since Tomas is her boyfriend’s brother and Iris is her

boyfriend's sister, Said had a motive to support Tomas' and Iris' claims. As a result of Said's failure to testify at this trial, the Respondents' attorney did not have the opportunity to cross-examine her about whether she was coached by Angel regarding what to say at her CCRB interview. As a result, I find her hearsay statement has little evidentiary value. As for Iris Rodriguez, although her CCRB interviewer initially posed pedigree questions to her in Spanish and allowed her to respond in Spanish, her native language, when her CCRB interviewer asked her about this event, she inexplicably switched to English. As a result, her description (in broken English) of what she heard and observed is disjointed and confusing. As a result, I find her hearsay statement also has little evidentiary value.

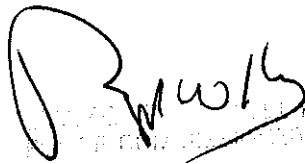
In sum, the testimony and statements offered by the Department did not sufficiently meet the Department's burden of presenting credible evidence which proves these charges by a preponderance of the evidence.²

The Respondents are found Not Guilty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner - Trials



² Since I have found that the Department did not meet its burden of proof and since the Respondents denied that they entered the apartment, there is no need to discuss the question of whether as a tactical safety matter the Respondents should have followed Palusko if he had entered the apartment so that they could provide back up support for him if he was physically confronted by someone inside.